No. 82-1563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD G. HALLEY,

Petitioner,

—against—

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF ON BEHALF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

The Facts

Plaintiff recalls no physical contact with anything during and after the derailment at 25 miles an hour (A98) of the train he was riding in, and felt no pain until about four hours later, when his chest bothered him (A58-9). He applied the emergency brakes when he felt the derailment occurring, and as the train came to a stop, he opened the door of the second engine, climbed down the side ladder, and stepped to the ground without losing his balance (A44-5, 96-8). He then walked to a tower 30 cars away (A46). No one else on the train was injured (A104).

The three doctors who treated his chest, Dr. Friedman, Sr. and Jr., and Dr. Genninger (A61, 65, 68), never testified at either trial. Plaintiff was never confined to a hospital for his injury and had no fractures or dislocations (A436). After his return to work on April 19, 1979 following 3½ months absence, plaintiff took no medication (A115), experienced no physical pain (A85) and received no further treatment for his chest (A114-5).

When he was examined on April 16, 1979 by Dr. Quinn for fitness to return to work, plaintiff was found qualified without restriction, and stated above his signature that he had no pain or pressure in his chest, that he had no excessive worry or depression, and that he knew of no physical or mental condition which might restrict his ability to work (A441). His psychologist, Dr. Rodgers, who counseled him until June of 1979 for depression and anxiety, in his report of April 12, 1979 placed no restrictions on his resumption of work (A442), and in his report of June 13, 1979 placed no restrictions, mentioned no residual fears or anxieties, and said that plaintiff's prognosis was fine (A215, 239, 452).

Plaintiff's principal claim was not his minor chest injury but an alleged phobia for riding fast freight trains, as opposed to local and yard freight trains, based on one attempt to ride a fast freight train in May of 1979 (A77-8) and a second attempt in December of 1979 (A81). Plaintiff has therefore confined his railroad work to local and yard freight, some of which go up to 40 miles an hour (A122), and has allegedly lost earnings because of not taking jobs on fast freights (A88-9). Dr. Rodgers at the original trial was not sure if plaintiff's phobia as to fast freights was permanent (A240) or if plaintiff still had it (212-3).

Dr. Eshkenazi, who was not a diplomate in his field and saw plaintiff once before the original trial at the request of plaintiff's attorney for the purpose of testifying (A246, 263-4), said plaintiff's problem was limited to a fear of fast trains (A256), said he didn't know if plaintiff's condition was permanent (A262) and suggested that plaintiff should have appropriate treatment so he could work fast freight trains (A284-5), which plaintiff has not done.

Plaintiff's estimate of lost earnings was based on hearsay from talking to others of higher seniority (A89) on the assumption, no longer true (A290, 292-3, 313, 316), that he now would

have sufficient seniority to hold down a regular fast freight conductor's job. His being on the extra list now allows him to make more money than if he held a regular job as he did before his accident (A303). He now gets overtime pay at time and a half on his local and yard freight jobs (A343-4). For the first six months after returning to work he earned $4,000 more than for the last six months before his accident (A129, Ex. D, 443). Based on current wage rates, shown in Exhibit 5 (A432-3), plaintiff can make about the same pay on his present work as he did before as a regular conductor in fast freight and with less distance to travel to and from work. The current pay for the job he had at the time of accident was $141.26 for brakemen and $151.00 for conductors (A164-6). By working four hours overtime on local and yard freight jobs, plaintiff can earn $141.08 as brakeman and $148.44 as conductor (Ex. 5, A453–see top and middle right-hand column of Ex. 5).

At the original trial plaintiff's attorney objected to the use of the net-income rule of the *Liepelt* case but agreed that if it applied it would be appropriate to use 25% of plaintiff's gross income as the amount of his income taxes (A354-5, 404, 423, 444, 449, 466).

The jury verdicts at the two trials differed radically: $185,000 at the first trial and $29,420 at the second trial (A421, 474A).

II.

Reasons for Denying Certiorari

Norfolk & Western Ry. Co. v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), reh. den. 445 U.S. 972, 100 S.Ct. 1667, 64 L.Ed.2d 250 (1980)–commonly referred to as the *Liepelt* decision–decided the very issue which petitioner claims (Petition, pp 6, 7, 8, 9, 13) that it did not decide, i.e., the applicability of the net-income rule to past lost earnings.

In *Liepelt* this Court held (p. 491) that "it was error to exclude evidence of the income taxes payable on the decedent's *past* [emphasis supplied] and estimated future earnings." Nowhere in its opinion did this Court make any distinction between past and future loss of net earnings.

Petitioner does not suggest that there is on this issue any difference in principle between death actions (*Liepelt*) and personal injury actions (case at bar). The Internal Revenue Code, 26 U.S.C. §104(a)(2), makes no such distinction and has been held to make awards in both types of action excludable from gross income.

> *Liepelt*, p. 496 and footnote 12;
> *Domeracki* v. *Humble Oil & Ref. Co.*, 443 F.2d 1245, 1249 (3rd Cir. 1971), *cert. den.* 404 U.S. 883;
> *Hooks* v. *Washington Sheraton Corp.*, 578 F.2d 313, 317 (D.C. Cir. 1977).

In both types of cases "past" loss of earnings means earnings lost from the date of injury to the date of trial, and "future" loss of earnings means loss of earnings from the date of trial into the future.

The trial courts have applied the net-income rule of *Liepelt* to both past and future earnings losses.

> *Rother* v. *Interstate and Oceanic Transport Co.*, 540 F. Supp. 477, 486 (E.D. Pa. 1982);
> *Brown* v. *Penrod Drilling Co.*, 534 F. Supp. 696, 699-700 (W.D. La. 1982);
> *Roselli* v. *Hellenic Lines, Ltd.*, 524 F. Supp. 2, 3-4 (S.D. N.Y. 1980);
> *Barger* v. *Petroleum Helicopters, Inc.*, 514 F. Supp. 1199, 1210 (E.D. Tex. 1981), rev'd on other grounds 692 F.2d 337;
> *Nesmith* v. *Texaco, Inc.*, 491 F. Supp. 561, 564-5 (W.D. La. 1980).

Petitioner cites no cases which have failed to apply the net-income rule to past loss of earnings, and presents no grounds for distinguishing past loss of earnings from future loss of earnings in applying the net-income rule. While petitioner apparently accepts applying the net-income rule to future loss of earnings, even though this may involve speculation and uncertainty, he rejects the application of the net-income rule to past loss of earnings, where the calculations are simpler and more certain and all the facts can be known by the time of trial.

What petitioner is really seeking here, without expressly saying so, is for this Court to reverse its recent decision in *Liepelt*. He advances many of the same arguments that were put before this Court in *Liepelt* in the original hearing and in the motion for rehearing.

Many of petitioner's arguments are simply incorrect. Railroad workers can receive sickness benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. §§351-367, up to 130 days or more and many carry their own or union insurance in addition, so it is not true that the "majority of railroad workers are not paid during the time they are out of work because of injury (Petition, p. 9) and are "forced to seek welfare or other State aid" (Petition, p. 11). Railroad workers are among the best paid of any, and for those few in poor financial condition, advance payments are frequently made.

Injured railroad workers have the right (usually not exercised) to allocate any part or all of a settlement to "time lost" so as to receive credit for that time toward their ultimate pension, so it is not true that when "an injured employee does not work and is not paid, he receives no credit toward his social security or pension funds" (Petition, p. 12). Whether he receives such credit is solely up to him not up to his employer, and whether his employer has to pay any unemployment or retirement taxes depends not on the employer's volition but on the employee's decision to allocate part or all of his settlement or judgment to "time lost".

The existence of the net-income rule of damages has nothing to do with the employee's allocation or non-allocation to "time lost", and that allocation, if made, can apply to both past and future earnings if the employee so chooses.

In conclusion, petitioner presents no cases to support his position, suggests no conflict among lower courts, offers no novel or important issue to be decided, evidences no gross miscarriage of justice in the case at bar, and indicates no federal law or practice in need of clarification or rectification. His petition is based on a misreading of *Liepelt*, and should be denied.

Respectfully submitted,

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